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Supreme Court

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No. 06-____

In the Supreme Court of the United States

E. KIRK SHELTON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under what circumstances is the prosecution entitled to a conscious avoidance instruction authorizing the jury to convict even if it does not find actual knowledge of wrongdoing: (a) is the prosecution entitled to the instruction, as some Circuits have ruled, whenever the defendant denies knowledge and there is evidence in the record of actual knowledge; or (b) is the prosecution entitled to the instruction only, as other Circuits have ruled, upon proof of acts or statements by the defendant evidencing avoidance of knowledge?

- PARTIES TO THE PROCEEDING

In addition to the parties in the caption, Walter A. Forbes was a co-defendant in the district court proceedings below.

RULE 29.6 STATEMENT

Petitioner states that he has no parent companies and no publicly held company that owns 10% or more of its stock.

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The petitioner, E. Kirk Shelton, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case on November 22, 2006.

OPINIONS BELOW

The opinion of the court of appeals is not reported and appears in the Appendix hereto at pages 1a-7a, *infra*. The court of appeals' order denying rehearing appears in the Appendix at pages 15a-16a, *infra*. The district court's opinion denying petitioner's motion for a new trial is not reported and appears in the Appendix at pages 8a-14a, *infra*.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The following constitutional and statutory provisions are reproduced in the Appendix at 17a-21a, *infra*: U.S. CONST. amend. V & VI; 15 U.S.C. §§ 78ff(a), 78j(b); 18 U.S.C. §§ 371, 1341, 1343.

JURISDICTION

The court of appeals issued its judgment on November 22, 2006 (App., *infra*, 1a-7a) and denied rehearing on January 23, 2007. *Id.* at 15a-16a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATEMENT

The Conflict. This case presents an important issue of criminal jurisprudence on which the Circuits are in conflict. The conflict has to do with *when* the prosecution is entitled to a "conscious avoidance" instruction – an instruction that permits the jury to find the knowledge element of a criminal offense to be proven if it finds that the defendant consciously avoided acquiring such knowledge. Five Circuits – including the Second Circuit below – permit

the instruction whenever 1) the defendant has denied knowledge and 2) there is evidence of actual knowledge in the record. Five Circuits permit the instruction only if there is some additional evidence in the record that the defendant *avoided* knowledge.

This Case Presents the Issue on which the Circuits are in Conflict. Petitioner Shelton was the President of CUC International, Inc. ("CUC"). During the late 1990s, CUC's operating profits were fraudulently inflated by manipulations carried out in CUC's accounting department under the direction of CUC's chief financial officer. Shelton's defense was that he did not know of the fraudulent accounting. There was evidence that he knew of the fraud, and there was evidence that he did not. However, there was no evidence that Shelton *avoided* learning of the fraud. *See infra* at 8-10.

At the conclusion of the evidence, the government requested a "conscious avoidance" instruction. The defense objected because there was no evidence in the record that Shelton *avoided* learning anything. The prosecutors cited none. Instead, they cited evidence of actual knowledge; and they told the trial judge in writing that the instruction was "virtually compelled" because Shelton had 1) denied knowledge, and 2) had "ready *access* to the information that *would have* revealed the fraud and *could have* directed any of [his] subordinates who were involved in the fraud to disclose that information to [him] ... ." Ex. 2 to Shelton's Main Br. (emphasis added).[1] The trial judge gave the instruction – thus offering the jury a way of convicting without having to decide whether Shelton had actual knowledge or not. The

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[1] "Shelton Main Br." and "Gov't Br." refer to the parties' respective briefs filed in the Second Circuit. "Tr." refers to the trial transcript. "A-__" refers to the appendix filed with the Second Circuit.

jury deliberated for 32 days over a period of nine weeks before reaching its verdict.

The Court of Appeals Decision. The court of appeals affirmed. It cited a prior Second Circuit case, *United States v. Walker*, 191 F.3d 326, 337 (2d Cir. 1999), as providing the applicable rule of decision. The court stated that *Walker* had identified "as 'a paradigmatic case of when a conscious avoidance charge is appropriate' one in which a supervisor *denied knowledge* of his employees' fraudulent conduct but where he reviewed their work and was *once confronted with evidence of falsity*." App., *infra* at 5a (emphasis added). The court then pointed to three conversations Shelton's subordinates claimed to have had with him that it found satisfied this paradigm. There were no acts or statements of *avoidance* of knowledge by the defendants either in *Walker* or in this case.

Every circuit follows the rule that the conscious avoidance instruction may be given only if there is evidence in the record sufficient to support a jury finding of deliberate avoidance of guilty knowledge. However, the circuits are split on the question what evidence satisfies this requirement. The Second Circuit joins the Fourth, Sixth, Seventh, and Eighth Circuits, each of which holds that the conscious avoidance instruction may be given when 1) the defendant denies knowledge and 2) the evidence in the record would support a finding of actual knowledge. *See infra* at 14-18. The Fifth, Ninth, Tenth, Eleventh and D.C. Circuits require additional proof that the defendant *avoided* knowledge before the instruction may be given. *See infra* at 18-20.

The Issue is an Important One. The conscious avoidance doctrine is an exception to the bedrock principle of criminal law that the prosecution must prove that the defendant *knew* of the facts making his conduct illegal. The

modern use of the doctrine stems from the seminal case of *United States v. Jewell*, 532 F.2d 697 (9th Cir. 1976) (en banc), in which the defendant had been paid $100 to transport marijuana across the Mexican border in a concealed compartment of someone else's car. In *Jewell*, the defendant told the arresting agents that he thought there was something illegal in the car, but that he avoided looking in the concealed compartment. He claimed that he therefore lacked knowledge. *Id.* at 699 n.2. The *Jewell* court approved the conscious avoidance instruction under those facts.

In the decade or so after *Jewell*, the conscious avoidance instruction was used only rarely. That is because "it is a rare occasion when the prosecution can present evidence that the defendant deliberately *avoided* knowledge." *United States v. Barbee*, 968 F.2d 1026, 1033 (10th Cir. 1992) (emphasis added; quotation omitted). *See also United States v. Pac. Hyde & Fur Depot, Inc.*, 768 F.2d 1096, 1098 (9th Cir. 1985) (Kennedy, J.). However, in recent years the instruction has been given more and more frequently. Indeed, the conscious avoidance instruction arose as an issue, or was mentioned on appeal, in *at least two hundred and eighty five opinions* in the United States Courts of Appeals during the last *ten years*. *See* Appendix E, 23a-36a, *infra*.. In many circuits, it appears that the instruction is now being used in virtually any case in which the prosecution's proof of actual knowledge is at all equivocal.

Moreover, the law on the question *when* the instruction should be given is in a state of disarray. Not only is there a conflict among circuits in the federal system, there are some inconsistencies within circuits. *See infra* at 17 n.14. Commentators have pointed out that there is "tremendous confusion in this area of law and a lurking sense that

something is fundamentally awry";[2] they have pointed out that there are "conflicting scienter requirements" under the conscious avoidance doctrine;[3] they have stated that "scholars and courts actively disagree about what the definition [of conscious avoidance] is,"[4] and they have called the confusion surrounding the doctrine "intolerable."[5]

This Court has never addressed the conscious avoidance doctrine in the thirty-one years since *Jewell*. Petitioner asks this Court to do so in this case. The instruction – on whose meaning and application federal judges disagree – communicates one thing for certain to jurors: that the prosecution may win its case on something less than proof of actual knowledge. The Circuits that approve the instruction whenever there is evidence of actual

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[2] Charlow, *Wilfull Ignorance and Criminal Culpability*, 70 TEX. L. REV. 1351, 1352 (1992).

[3] *See, e.g.*, Note, *A Conflict in the Knowledge Requirement for Possession Between the Tenth and Fifth Circuit: Should it Be Permissible to Infer that a Driver of a Vehicle Has Knowledge of the Contraband Within it or Does Knowledge Require Additional Circumstantial Evidence?*, 27 N.E. J. ON CRIM. & CIV. CONFIN., 131, 145-57 (2001).

[4] Michaels, *Acceptance: The Missing Mental State*, 71 S. CAL. L. REV. 953, 980-81 (1998) (also noting that lack of guidance and confusion among courts regarding willful blindness results in juries reaching different results in seemingly factual identical cases).

[5] Husak & Callender, *Willful Ignorance, Knowledge, and the "Equal culpability" Thesis: A Study of the Deeper Significance of the Principle of Legality*, 1994 WISC. L. REV. 29, 44 (1994) (noting that "intolerable" confusion surrounds doctrine). *See also* Note, *Model Penal Code Section 2.02(7) and Willful Blindness*, 102 YALE L.J. 2231, 2231 (1993) (stating that "courts and criminal law scholars have struggled for decades to sort out" the concept of willful blindness); Note, *United States v. Alvarado: Reflections on a Jewell*, 19 GOLDEN GATE U. L. REV. 47, 65 (1989) (asserting that doctrine is frequently "misunderstood and misused").

knowledge in the record, are holding that the jury should be permitted to infer conscious avoidance – *and convict on something less than actual knowledge* – in virtually any case in which knowledge is the issue. We submit that this burden-lowering conscious avoidance instruction should be used only in cases in which there is real evidence of avoidance of knowledge.

The instruction is especially treacherous when the issue is whether a corporate supervisor had knowledge of wrongdoing by subordinates. If the jury is unpersuaded that the supervisor *knew* of the wrongdoing by the subordinates, or is divided on that question, the supervisor should not be convicted of criminal wrongdoing.[6] But under the rule in several Circuits, the jury is allowed to infer conscious avoidance – and convict – *even in the absence of any evidence that the defendant engaged in acts or made statements evidencing avoidance.* The jury will already be reluctant to absolve a well compensated executive who claims ignorance of wrongdoing on his watch. And particularly in a long jury deliberation, such as occurred here, there is a significant likelihood of a compromise verdict based on something less than actual knowledge.

Accordingly, we petition this Court to grant the writ and resolve the conflict and confusion in the lower courts by holding that the instruction may not be given based solely on evidence (direct or circumstantial) of actual knowledge coupled with a failure to ask more questions; and that it may only be given upon evidence that the defendant took actions or made statements evidencing *avoidance* of knowledge.

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[6] This is so at least where there is no evidence that the defendant took steps to avoid such knowledge.

STATEMENT OF THE CASE

Factual Background. Petitioner Shelton is the former president of CUC. CUC sold memberships in discount buying clubs, which included programs for home shoppers, travelers, restaurant patrons and automobile purchasers. CUC was genuinely profitable at all times; and its legitimate profits continued to grow – in part as a result of efficiency enhancing mergers. However, it turned out that during the mid to late 1990s, CUC's publicly reported operating profits had been overstated by fraudulent accounting manipulations carried out in CUC's accounting department.

The accounting manipulations related mainly to improper use of merger reserves. Once a merger reserve is set up, one time expenses relating to the merger may properly be charged against the reserve. The one time merger expenses can be significant. They include not just things like investment banking and attorneys' fees. They also include expenses related to the phasing out of redundant operations such as post-merger rent and lease termination payments on buildings that are no longer needed by the combined entity, and they include post-merger salaries and severance packages for employees whose work is no longer needed. Tr. 443-50; Tr. 10029-30.[7] Recurring operating expenses, on the other hand, may not be charged to the merger reserve. The CUC accountants charged many millions of dollars of operating expenses to the merger reserve, and thus improperly inflated the operating profits shown on CUC's publicly available books during the period 1995-1997.

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[7] For CUC, the merger reserves totaled over $100 million in the case of each of two mergers. A-399-400; A-5045.

The Indictment. In late 1997, CUC merged with HFS, Inc. to become Cendant Corp. ("Cendant"). In April of 1998, a CUC accountant (by then employed by Cendant) named Caspar Sabatino voluntarily disclosed the fraud. An investigation followed. In 2002, a superseding indictment was filed against Petitioner Shelton and CUC Board Chair Walter A. Forbes. The indictment charged Shelton with one count of conspiracy–the objects of which were to commit mail, wire and securities fraud and to make false statements to the SEC; two counts of mail fraud; one count of wire fraud; two counts of making false statements to the SEC; and six counts of securities fraud.

The Trial. Trial commenced on May 10, 2005 and concluded on November 4, 2005. Shelton's defense at trial was that he did not know that the accounting was fraudulent. There was conflicting evidence on the knowledge issue. According to the government's evidence, the fraud began under a CFO, Stuart Bell ("Bell"), who did not report to Shelton. Bell was later replaced as CFO by his deputy Cosmo Corigliano ("Corigliano"), who did report to Shelton, and Corigliano continued the practices that Bell had begun. Tr. 6245-46, 6343-48, 6367-69, 6371-74. Shelton enjoyed a particularly good reputation for honesty and integrity; and the whistleblower, Sabatino, testified that the fraud was "concealed" from Shelton. Tr. 4913. However, Corigliano and CUC Controller Anne Pember ("Pember") each testified under plea agreements that they told Shelton of their fraud. Both received extremely lenient sentences as a result.

The government also offered circumstantial evidence in an effort to prove Shelton's knowledge. Principally, the government relied on documents produced within CUC during the course of each accounting year, *some* of which Shelton and other CUC officers concededly saw. These documents showed that "reserve" adjustments were going to

be made at year end, and showed that the adjustments would have the effect of increasing the operating income on CUC's books. A-281, A-284, A-468, A-469.[8] The government suggested throughout the trial that use of reserves at year end to increase income necessarily signals fraud. *E.g.*, Tr. 14830-31, 14958-59, 15072-73. However, this was shown to be incorrect. Many concededly innocent people at CUC saw documents reflecting that reserves were to be used at year end, with the effect of increasing the operating income on CUC's books, and none suspected fraud. *E.g.*, Tr. 10892-93, 11990-91. Indeed, at one key meeting on March 9, 1998, Cendant CFO Michael Monaco, a government witness, had gone over detailed documents reflecting the use, at year end, of $99 million in reserves to increase income shown on CUC's books. Monaco discussed the use of these reserves with CUC's outside auditor, an Ernst & Young accountant who already knew about them, and both of them concluded the use of those reserves was entirely proper. Tr. 1638, 2151, 2183. *See* discussion in Shelton Main Br. at 47-51.[9]

Thus, there was both direct and arguably circumstantial evidence that Shelton *knew* of the fraud. There was also contradictory direct and circumstantial evidence that he *lacked knowledge*. There was no evidence in the record, however, that Shelton ever *avoided* learning

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[8] The government's lead witness Cosmo Corigliano repeatedly referred to these documents during trial as "cheat sheets." But many other concededly innocent witnesses saw them, and *they* knew the documents only as "forecasts." Tr. 60892-93, 3053, 11745.

[9] It has turned out that much of this use of this $99 million in merger reserves had in fact been *improper*. However, the fact that two experienced accountants did not infer fraud from the use of these reserves, after reviewing these documents, shows that use of reserves to improve income can be entirely proper. The government conceded this in the Court below. Gov't Br. at 95.

anything. The prosecution, as it conceded below, never contended in its summation or at any other time during the trial that Shelton avoided knowledge. Gov't Br. at 102. The prosecutors did, however, contend repeatedly that Shelton supervised Corigliano and Pember and thus had "*access*" to information that would have revealed the fraud, and that he *could have* demanded to see e-mails and other documents reflecting it. *See* Tr. 12661-66, 12759-72, 12829, 12913-14 (Cross), 14870-71 (Summation).

The Conscious Avoidance Instruction and the Verdict. At the close of the trial, the government requested a conscious avoidance instruction, arguing in writing to the trial judge that the instruction was "virtually compelled" because Shelton had 1) denied knowledge, and 2) had "ready *access* to information that *would have* revealed the fraud and *could have* directed any of [his] subordinates who were involved in the fraud to disclose that information to [him.]" Ex. 2 to Shelton's Main Br. (emphasis added). The government also referred the trial judge to nine items of evidence that it claimed constituted evidence supporting a conscious avoidance instruction. These nine items were listed in a written submission, with a few others added in an oral submission, to the trial judge. *See* Exs. 1 and 2 to Shelton's Main Br. These nine items, *if believed*, would have tended to show actual knowledge, but not avoidance of knowledge. *And none of these items was relied on by the court of appeals when it upheld the instruction.*

Shelton objected to a conscious avoidance instruction twice in writing and three times orally on the ground that there was no evidence of avoidance of knowledge. *See citations in* Shelton Main Br. at 57-59. The trial judge delivered the instruction anyway. The trial judge instructed the jury on conscious avoidance as to every count of the indictment. He repeated the phrase "conscious avoidance"

nine times during his charge. Tr. 16296, 16300 (twice) 16320, 16322 (twice), 16340, 16366, 16378. The jury deliberated for thirty-two days over a period of nine weeks and finally returned a verdict of guilty against Shelton.[10]

The Decision of the Court of Appeals. Shelton appealed his conviction, and ten year jail sentence, principally on the ground that there was no evidence in the record that he avoided learning about the fraud; and that the conscious avoidance instruction should, therefore, not have been given. He contended that the instruction impermissibly permitted the jury to convict even if it could not agree on whether he actually knew of the fraud; he argued that the prosecutors exploited the instruction by repeatedly arguing that he had *access* to information about the fraud and could have obtained that information if he had asked for it; and he urged that, in light of the unusually extended jury deliberation, the erroneous instruction could not possibly be deemed harmless.

The court of appeals affirmed. It cited *United States v. Walker*, 191 F.3d 326, 337 (2d Cir. 1999) as stating the "paradigm" for *when* the conscious avoidance instruction is appropriate. It quoted from *Walker* and stated that *Walker* had identified as 'a paradigmatic case of when a conscious avoidance charge is appropriate' one in which a supervisor *denied knowledge* of his employees' fraudulent conduct but where he reviewed their work and *was once confronted with evidence of falsity*." App., *infra* at 5a (emphasis added).

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[10] There was a co-defendant – CUC Board Chair Walter Forbes – and some of the jury deliberation plainly related to him. The jury notes suggest that roughly the first half of the deliberations pertained to Shelton and the second half pertained to Forbes. *See* Shelton's Main Br. at 84 n.34. The jury hung as to Forbes.

There was no mention in *Walker* of any acts or statements of the defendant in *Walker* evidencing avoidance.

The court of appeals relied on three items of evidence in this case that it concluded satisfied this paradigm. Each – *if believed by the jury* – would have established actual knowledge. None involved acts or statements of Shelton evidencing avoidance of knowledge.[11] And none was among the nine items of evidence that the prosecution relied upon when it sought the instruction from the trial judge. The three items are discussed in detail *infra* at 26-30.

REASONS FOR GRANTING THE PETITION

Because of the importance and practical impact of these issues, which arise frequently and on which the federal courts are divided, this Court's review is fully warranted.

I. THERE IS A CONFLICT ON WHEN A JURY MAY PROPERLY INFER CONSCIOUS AVOIDANCE

A. The Nature of the Conflict

All courts of appeals agree that it is error to give a conscious avoidance instruction unless there is sufficient evidence in the record to support a jury finding that the

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[11] One involved a document that Pember claimed she showed to and explained to Shelton, and which the prosecutors called the "executive summary of the fraud." Tr. 15039, 15042. One involved a conversation that Corigliano claimed he had with Shelton and co-defendant Forbes in which he said he described three "smoking gun" examples of fraudulent accounting. Tr. 7341-42. And the other one involved a conversation in which Pember claimed she explained one of these examples to Shelton. Tr. 2905-07. Each presented the jury with an issue of credibility, not avoidance.

defendant consciously avoided obtaining knowledge.[12] It is error because giving the instruction when it is not supported by the evidence creates a risk that the jury will convict on the impermissible basis that the defendant should have done more to learn the truth. *See Alston-Graves*, 435 F.3d at 340 (summarizing case law and noting concern with this instruction that "the jury might convict a defendant for acting recklessly"); *see also Pac. Hide & Fur Depot*, 768 F.2d at 1098; *United States v. Ferrarini*, 219 F.3d 145, 157 (2d Cir. 2000) (jury might convict "if it believed that the defendant had not tried hard enough to learn the truth").

A conflict has developed, however, on what constitutes sufficient evidence to support a finding of conscious avoidance. Some circuits routinely approve the conscious avoidance instruction whenever the defendant denies knowledge in the face of evidence that the defendant had actual knowledge. Thus, in these circuits the rule of law is that a defendant's denial of knowledge in the face of evidence of actual knowledge is a sufficient basis for a jury to infer conscious avoidance of knowledge – even though there may be no acts or statements by the defendant suggesting that he *avoided* knowledge.

Other circuits hold that the defendant's denial of knowledge in the face of direct or circumstantial evidence of actual knowledge is not, by itself, a legally sufficient basis for a jury to infer that the defendant consciously avoided obtaining knowledge. These circuits approve the instruction

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12 *See, e.g., United States v. Alston-Graves*, 435 F.3d 331, 338 n.5 (D.C. Cir. 2006) (collecting cases from numerous circuits); *see also United States v. Giovannetti*, 919 F.2d 1223, 1228 (7th Cir. 1990) ("when the facts require the jury to make a 'binary choice' between 'actual knowledge' and 'complete innocence,' the ostrich instruction should not be given").

only when there is evidence that the defendant engaged in acts or made statements evidencing avoidance of knowledge.

B. Five Circuits Permit A Jury To Infer Conscious Avoidance From A Defendant's Denial Of Knowledge In The Face Of Evidence Of Actual Knowledge

The Second, Fourth, Sixth, Seventh, and Eighth Circuits, and perhaps the Third Circuit each permit the instruction when the defendant denies knowledge and there is evidence in the record of actual knowledge.

Second Circuit case examples include *United States v. Jacobs*, 117 F.3d 82, 98 (2d Cir. 1997) (defendant who "chose to plead ignorance" in the face of evidence that "tends to indicate actual knowledge" "created the need for a jury instruction on conscious avoidance"); *United States v. Walker*, 191 F.3d 326, 337 (2d Cir. 1999) (in this "paradigmatic case of when a conscious avoidance charge is appropriate" the defendant employer claimed ignorance of his employees' fraud, but he supervised and reviewed his employees' work, and once was confronted with evidence of falsity); *United States v. Aina-Marshall*, 336 F.3d 167, 171 (2d Cir. 2003) (the instruction is "appropriate in all but the highly unusual – perhaps non-existent – case" in which a "defendant charged with knowingly possessing contraband items takes the stand and admits possession of the contraband but denies having known of the nature of the items"); *United States v. Aulicino*, 44 F.3d 1101, 1115-16 (2d Cir. 1995) (instruction approved where defendant "claimed lack of knowledge that a goal of the conspiracy he joined was kidnapping" in light of evidence that defendant "was a

knowing participant in a conspiracy whose goal he knew was kidnapping").[13]

Like the Second Circuit, the Eighth Circuit is expressly of the view that a conscious avoidance "instruction is particularly appropriate when the defendant denies any knowledge of a criminal scheme despite strong evidence to the contrary." *United States v. Regan*, 940 F.2d 1134, 1136 (8th Cir. 1991). Eighth Circuit decisions approving the instruction when the defendant has denied knowledge in the face of evidence of actual knowledge, but where there is no evidence of avoidance, include *United States v. King*, 351 F.3d 859, 867 (8th Cir. 2003) (instruction approved in the face of "evidence [that] certainly suggested that [defendant] was not *ignorant* of the criminal scheme, but rather he, in fact, *knew* of the scheme and worked to perpetuate the [crime]") (emphasis in original); *United States v. Hildebrand*, 152 F.3d 756, 764-65 (8th Cir. 1998) (instruction approved in light of abundance of evidence that defendants had actual knowledge of fraud); *United States v. Massa*, 740 F.2d 629, 643 (8th Cir. 1984) ("instruction was particularly appropriate because both defendants testified that they did not know of the [charged] scheme to defraud [the victim], in the face of strong evidence to the contrary").

Sixth Circuit decisions include *United States v. Williams*, 75 Fed. Appx. 480, 485 (6th Cir. 2003) (instruction approved when defendant claimed ignorance of guns'

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[13] In *United States v. Ferrarini*, 219 F.3d 145, 157 (2d Cir. 2000) the Second Circuit said that proof of actual knowledge would not support a conscious avoidance instruction and suggested that additional evidence of avoidance was required. The continued vitality of *Ferrarini* was questioned in the later second circuit decision in *United States v. Aina-Marshall*, 336 F.3d at 171-72, and by the government in its brief below. *See* Gov't Br. at 77. The court of appeals in its opinion below relied on *Aina-Marshall* and never mentioned *Ferrarini*.

presence even though guns were "'literally strewn' about his Detroit home and guns were plainly visible in the bedroom closet and kitchen cupboard of his Southfield home"); *United States v. Benson*, 79 Fed. Appx. 813, 825 (6th Cir. 2003) ("sufficient evidence supported giving the instruction" because the facts "strongly suggest that [defendant] understood the [charged Ponzi scheme] in sufficient detail").

Seventh Circuit decisions include *United States v. Mabrook*, 301 F.3d 503, 508-09 (7th Cir. 2002) (instruction approved where defendant company owner denied charges that his company was a fraudulent investment scheme, in the face of evidence that defendant personally "induced his friends to invest" by showing them "false" financial statements while also signing the company's tax returns the reported the company's "true financial worth," and evidence that defendant "was aware" that the company "had never produced 50,000 cases of [product] as the [false] purchase orders [shown to investors] claimed"); *United States v. Wallace*, 212 F.3d 1000, 1003 n.7, 1005 (7th Cir. 2000) (in case with "plenty of evidence to show that [defendant] had actual knowledge" of fact that gun was used during robbery, "[b]y testifying that he had no knowledge of his brother's use of guns during the robbery, [defendant] made the ostrich instruction applicable"); *United States v. Fawley*, 137 F.3d 458, 467 (7th Cir. 1998) (instruction approved when defendant "denied any knowledge as to the fact that [the company's] employees were illegal aliens," in the face of evidence that "clearly demonstrate that [defendant] had knowledge" of this fact, including evidence through other witnesses' testimony that they "told" defendant this fact).[14]

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[14] These Seventh Circuit decisions seem inconsistent with the earlier pronouncement in *Giovannetti* (discussed in greater detail *infra* at 21-22), which seems to hold that delivery of the instruction is reversible error unless there is evidence that the defendant has "taken steps" to avoid

Fourth Circuit decisions include *United States v. Abbas*, 74 F.3d 506, 514 (4th Cir. 1996) (instruction approved where defendant claimed he thought he and his partner were selling gemstones, not heroin, in the face of evidence pointing to defendant's actual knowledge of the heroin, *i.e.*, (a) his partner's testimony that the defendant "knew that the suitcase contained heroin," and (b) tape recordings confirming the defendant "discussed future drug transactions, the difficulty in dealing with small bills, and the difference between liquid and powdered forms of drugs"); *United States v. Schnabel*, 939 F.2d 197, 203-04 (4th Cir. 1991) (approving the instruction where there was "evidence of a wide variety of fraudulent practices that took place" in defendant's office while he was vice president, because "[t]his evidence alone could easily support the inference that if [the defendant] was unaware of what was happening around him, it was because he deliberately shut his eyes to it").[15]

C. Five Circuits Do Not Permit A Jury To Infer Conscious Avoidance From A Defendant's Denial Of Knowledge In The Face Of Evidence Of Actual Knowledge

Courts of appeals that largely adhere to what petitioner submits is the proper rule include the Fifth, Ninth, Tenth, Eleventh, and D.C. Circuits, and perhaps the First

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knowledge. 919 F.2d at 1228. *See also United States v. Carillo*, 435 F.3d 767 (7th Cir. 2006).

[15] The Third Circuit's position on this conflict is not entirely clear, but it appears to permit a jury to infer conscious avoidance when a defendant denies knowledge in the face of circumstantial evidence indicative of actual knowledge, and not of avoidance of knowledge. *See, e.g., United States v. Leahy*, 445 F.3d 634, 653-54 (3d Cir. 2006); *United States v. Brodie*, 403 F.3d 123, 135-46 (3d Cir. 2005).

Circuit. These circuits find error in delivery of the instruction where the evidence showed at most actual knowledge, and not any avoidance of knowledge.

Ninth Circuit cases include Justice Kennedy's decision in *Pac. Hide & Fur Depot*, 768 F.2d at 1097-99 (instruction erroneous in hazardous waste case when the "evidence, to the extent relevant, points to actual knowledge, rather than deliberate avoidance"). They also include *United States v. Mapelli*, 971 F.2d 284, 287 (9th Cir. 1992) (same: evidence in tax evasion case demonstrated actual knowledge not avoidance); *United States v. Sanchez-Robles*, 927 F.2d 1070, 1074-75 (9th Cir. 1991) (instruction erroneous in marijuana case; defendant driver's denial of knowledge of transporting marijuana in the face of strong marijuana odor was not evidence of conscious avoidance; it was either actual evidence of knowledge if she recognized the odor, or was no evidence of knowledge if she did not recognize the odor).

Fifth Circuit cases include *United States v. Mendoza-Medina*, 346 F.3d 121, 133 (5th Cir. 2003) (instruction erroneous in case *with* evidence of actual knowledge and *without* evidence of avoidance; "[t]he *sine qua non* of deliberate ignorance 'is the *conscious* action of the defendant – the defendant *consciously* attempted to escape confirmation of conditions or events he strongly suspected to exist'") (emphasis in original; quoting *United States v. Lara-Velasquez*, 919 F.2d 946, 951 (5th Cir. 1990)); *United States v. Threadgill*, 172 F.3d 357, 369 (5th Cir. 1999) (instruction erroneous because "there is little evidence that the defendants purposefully contrived to avoid knowing that their actions were unlawful. In fact, the evidence reveals just the opposite, that the defendants knew that their conduct was criminal and took elaborate measures to hide it").

Tenth Circuit decisions include *United States v. Hilliard*, 31 F.3d 1509, 1516 (10th Cir. 1994) (reversing for erroneous instruction in case with evidence of actual knowledge: "we have stressed that evidence is required showing that . . . defendant's actions include deliberate acts aimed at avoidance of actual knowledge"); *Barbee*, 968 F.2d at 1033 (instruction erroneous where there was evidence of actual knowledge, but "the record does not suggest any evidence of deliberate acts to avoid actual knowledge"); *United States v. de Francisco-Lopez*, 939 F.2d 1405, 1409, 1411 (10th Cir. 1991) (reversing for erroneous instruction in case with evidence of actual knowledge, and holding that the instruction may be given only if "defendant's conduct includes deliberate acts to avoid actual knowledge," and "[t]he acts relied upon . . . must be deliberate and not equivocal").

Eleventh Circuit decisions include *United States v. Schlei*, 122 F.3d 944, 953, 973 (11th Cir. 1997) (instruction erroneous where defendant denied knowing the financial instruments he sought to sell were counterfeit, but where "the evidence demonstrated [only] that [defendant] had actual knowledge that the instruments were counterfeit, but chose to disregard that knowledge"); *United States v. Rivera*, 944 F.2d 1563, 1572 (11th Cir. 1991) (instruction erroneous because "evidence presented at trial was consistent only with a theory supporting the defendants' actual knowledge").

The conscious avoidance instruction has "received little attention" in the D.C. Circuit, but that court's only extended treatment of the issue held the instruction to be erroneous in a case with evidence of actual knowledge but no

evidence of avoidance. *See Alson-Graves*, 435 F.3d at 341-42.[16]

II. THIS CONFLICT PRESENTS AN IMPORTANT ISSUE THAT SHOULD BE ADDRESSED BY THIS COURT

For several reasons, this Court should grant this petition, resolve the conflict, and return the conscious avoidance doctrine to its properly limited scope.

A. Conscious Avoidance is a Judicially Created Doctrine that Expands Statutory Law on Criminal Liability

The conscious avoidance doctrine is a judicially created doctrine that frequently broadens the scope of liability provided by statutory criminal law. Quite simply, a conscious avoidance instruction "permits a finding of knowledge even where there is no evidence that the defendant possessed actual knowledge." *United States v. Svoboda*, 347 F.3d 471, 477-78 (2d Cir. 2003) (quotation omitted). Because "[i]t is the legislature, not the Court, which is to define a crime," it is vitally important that the conscious avoidance instruction not be interpreted to expand

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[16] Petitioner has not found a First Circuit case holding a delivery of a conscious avoidance instruction to be erroneous. But the First Circuit appears to side with those circuits requiring the instruction to be supported by evidence of avoidance, and not merely by a defendant's denial of knowledge in the face of evidence of actual knowledge. *See United States v. Bilis*, 170 F.3d 88, 93 (1st Cir. 1999) (case can be submitted to the jury on alternative theories of both actual knowledge and avoidance of knowledge "[a]s long as separate and distinct evidence supports a defendant's deliberate avoidance of knowledge") (*quoting United States v. Brandon*, 17 F.3d 409, 452 n.74 (1st Cir. 1994)).

criminal liability beyond the scope intended by Congress. *Dowling v. United States*, 473 U.S. 207, 214 (1985).

Congress perhaps can be expected to have intended that any statutory knowledge element could be satisfied by proper evidence under the common law doctrine of conscious avoidance. But, the common law doctrine of conscious avoidance originally applied to cases in which there was *direct proof* that the defendant had *taken steps to avoid finding out* the facts so that he could later claim that he did not know his conduct was illegal.[17] For example, Justice Kennedy identified a "classic illustration" of this doctrine as being "the connivance of an innkeeper who deliberately arranges not to go in his back room and thus avoids visual confirmation of the gambling he believes is taking place." *Jewell*, 532 F.2d at 705 (Kennedy, J., dissenting) (citing *Bosley v. Davies*, 1 Q.B.D. 84 (1875)).

Judge Posner has described clearly the type of case for which the conscious avoidance instruction is designed. Responding to criticism of the conscious avoidance doctrine, Judge Posner stated,

> The criticism can be deflected by thinking carefully about just what it is that real ostriches do (or at least are popularly supposed to do). They do not just fail to follow through on their suspicions of bad things. They are not merely *careless* birds. They bury their heads in the sand so that they will not see or hear bad things. They *deliberately* avoid acquiring unpleasant

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[17] The history of the conscious avoidance doctrine is addressed in Robbins, *The Ostrich Instruction: Deliberate Ignorance as a Criminal Mens Rea*, 81 J. CRIM. L. & CRIMINOLOGY 191, 196-209 (1991).

> knowledge. The ostrich instruction is designed for cases in which there is evidence that the defendant, knowing or strongly suspecting that he is involved in shady dealings, *takes steps* to make sure that he does not acquire full or exact knowledge of the nature and extent of those dealings.

Giovannetti, 919 F.2d at 1228 (some emphasis added) (reversing for erroneous delivery of conscious avoidance instruction, even though there was evidence of actual knowledge). *See* note 14, *supra*.

There is no reason to believe Congress understood that the conscious avoidance doctrine would be used in the absence of acts or statements of the accused evidencing *avoidance* of knowledge.

B. Use Of The Conscious Avoidance Instruction Has Expanded Greatly Without This Court's Guidance

Use of the conscious avoidance instruction has expanded greatly over the past 30 years without any guidance from this Court. This unguided expansion has led both to the conflict addressed above and to other conflicts and confusion surrounding the proper use and scope doctrine that are addressed below.

The common law doctrine of conscious avoidance received relatively little attention in the United States until it was discussed at length in *Jewell*, 532 F.2d at 700-08—a case in which the facts properly supported a conscious avoidance instruction. The defendant was paid $100 to transport marijuana across the border in a concealed compartment in the truck of some else's car. The defendant admitted to the agent who stopped him that he "thought there

was probably something wrong and something illegal in the vehicle." He said that he noticed a hidden compartment in the trunk, and decided not to look in it. *Id.* at 699 n.2. The Ninth Circuit approved the instruction under those facts.

For a time after the *Jewell* decision, the conscious avoidance instruction was given only rarely—a reflection of the fact that "it is a rare occasion when the prosecution can present evidence that the defendant deliberately avoided knowledge." *Barbee*, 968 F.2d at 1033 (quotation omitted). *See also Pac. Hyde & Fur Depot*, 768 F.2d at 1098 (Kennedy, J.).[18]

Now, thirty-one years after the seminal *Jewell* decision, conscious avoidance instructions are no longer rare. They "are now commonly given and commonly upheld" in the federal courts. *Alston-Graves*, 435 F.3d at 338; *cf. United States v. Heredia*, 2007 U.S. App. LEXIS 7558, at *24 n.16 (9th Cir. 2007) (en banc) (retreating from earlier circuit precedent that instruction should be given "rarely"). Indeed, the conscious avoidance instruction has been mentioned on appeal in criminal cases in at least two hundred and eighty-five opinions by United States Courts of Appeals during the last ten years (1997-2006). *See* Appendix E, 23a-33a, *infra*. This is an over 400 percent increase from the ten-year period immediately following the 1976 *Jewell* decision (1976-1985). *See id.* at 34a-36a, *infra*.

This dramatic increase in the use of the conscious avoidance instruction appears to be due in substantial part to some courts of appeals' increasing willingness to approve of the instruction in cases having no evidence of conscious

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[18] Other circuits have recognized the point. *See Alston-Graves*, 435 F.3d at 340-41 & nn.10-14 (collecting cases from numerous circuits recognizing that instruction should be given "rarely").

avoidance, but only evidence that a defendant denies knowledge in the face of some evidence that he had actual knowledge.

C. Conscious Avoidance Instructions are Being Given Routinely When Company Officials Deny Knowledge of the Criminal Acts of their Subordinates

A particularly disturbing trend in the growing use of the conscious avoidance instruction is its increased use in cases presenting no evidence of conscious avoidance, but in which a company or government official has merely denied knowledge of the criminal conduct of the official's subordinates in the face of some evidence of actual knowledge. Examples include *Mabrook*, 301 F.3d at 508-09; *Walker*, 191 F.3d at 337; *Schlei*, 122 F.3d at 973-74; *Mapelli*, 971 F.2d at 286-87; *Schnabel*, 939 F.2d at 203-04.

This trend is disturbing because juries are likely already to be unsympathetic to a corporate executive's denial of knowledge about subordinates' conduct. When such juries find it difficult to resolve whether such a defendant had actual knowledge, the "danger" of the conscious avoidance instruction is that "juries will avoid [the difficult] questions of scienter and convict under the standards analogous to negligence. Such convictions are wholly inconsistent with the statutory requirement of scienter." *United States v. Murriata-Bejaraneo*, 552 F.2d 1323, 1326 (9th Cir. 1977) (Kennedy, J., concurring in part and dissenting in part).

D. There Is Wide-Spread Confusion Over The Proper Scope And Use Of The Conscious Avoidance Doctrine

Plainly, widespread confusion exists over the proper scope and use of the conscious avoidance doctrine. Justice

Kennedy noted this confusion over thirty years ago (*see Jewell* 532 F.2d at 706 & nn. 8-10 (Kennedy, J., dissenting)), and the confusion has not subsided. *See, e.g., Alston-Graves*, 435 F.3d at 338-39 & nn. 3-5 (noting that circuits differ on the rationale for the doctrine, the wording of instructions, and the limits on the doctrine's proper use); *accord United States v. One 1973 Rolls Royce by & Through Goodman*, 43 F.3d 794, 808, 809 n.12 (3d Cir. 1994) ("[C]ourts and commentators have yet to come to a consensus on definition of willful blindness . . . Willful blindness has proven to be an elusive concept and much disagreement still exists over the appropriate definition of the term"); *United States v. Hercules, Inc.*, 929 F. Supp. 1418, 1430 (D. Utah 1996) ("[t]here is significant conflict as to the substantive meaning of [conscious avoidance] among federal circuits").[19] Indeed, circuits acknowledge the very split asserted here: whether a conscious avoidance instruction is proper when the evidence points only to actual knowledge. *See Alston-Graves*, 435 F.3d at 342 & n.15. As noted *supra* at 4-5, commentators have long lamented the divergent approaches regarding conscious avoidance in the courts.

This Court has not addressed the conscious avoidance instruction in the 31 years since *Jewell*. And, as Justice White once observed, fundamental fairness dictates "that the

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[19] As recently as last year, the Second Circuit acknowledged that "[t]he doctrine of conscious avoidance is indeed susceptible of several well-founded attacks." *United States v. Nektalov*, 461 F.3d 309, 311 (2d Cir. 2006). Indeed, some state courts and federal judges reject use of the doctrine altogether. *See, e.g., Heredia*, 2007 U.S. App. LEXIS 7558, at **46-52 (Graber, J. dissenting) (urging that federal courts abandon doctrine and that Congress can delineate "willful blindness" as a statutory mens rea if it so chooses); *State v. Bogle*, 376 S.E.2d 745, 747-48 (N.C. 1989) (adopting same view); *State v. Nations*, 676 S.W.2d 282, 285 (Mo. App. 1984); *accord Andrews v. Florida*, 536 So.2d 1108, 1112 (Fla. App. 1988) (Stone, J., concurring in part and dissenting in part).

outcome of a federal criminal prosecution should not depend upon the circuit in which the case is tried." *Tomala v. United States*, 504 U.S. 932, 933 (1993) (White, J., joined by Thomas, J., dissenting from denial of certiorari).

III. RETURNING THE CONSCIOUS AVOIDANCE DOCTRINE TO PROPERLY LIMITED SCOPE OF USE WOULD REQUIRE A REVERSAL IN THIS CASE

In concluding that there was evidence from which the jury could have found conscious avoidance, the court of appeals below relied on three items of proof. Each, if believed, would have supported a finding of actual knowledge. None involved any acts of avoidance.

The first item of evidence was described in the court of appeals' decision as follows:

> when [Shelton was] ***reviewing*** with a co-conspirator a document that stated that "reserves are being managed to meet quarterly targets [which the government argued indicated fraudulent accounting]," Shelton tore it up and said, "I guess I never saw that document."

App., *infra*, at 4a (emphasis added). Thus, the court's own description of this evidence says that Shelton was affirmatively "reviewing" the contents of the document, not ***avoiding*** learning about those contents.[20] Furthermore,

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[20] The government's evidence was that Shelton read the document, that the government witness explained it to him for "about ten minutes or so," and that he asked questions about it. Tr. 2879, 4215. The defense evidence was that the event never happened. Tr. 12,400. There was no evidence of avoidance.

tearing up or denying having seen a document that one has already read is not conscious avoidance of the document. As then-Judge Kennedy observed, such efforts to hide or "bury" incriminating evidence "points to actual knowledge, rather than deliberate avoidance. It does not support the giving of a *Jewell* [conscious avoidance] instruction." *Pac. Hide & Fur Depot*, 768 F.2d at 1099.

The second item of evidence was described as being,

> when [Shelton was] traveling with co-defendant Walter Forbes and a co-conspirator, Walter Forbes asked if there were 'any ***other smoking guns*** that we have to worry about,' to which the co-conspirator responded with a partial list of the accounting frauds at issue, and Shelton did not further inquire.

App., *infra*, at 4a (emphasis added). Here, the government's cooperating witness, CFO Corigliano, was, by his own account, telling Shelton about "smoking guns," *i.e.*, obvious crimes. Tr. 7341-42. Corigliano had testified to discussing these exact same accounting issues with Shelton on two other occasions; and his own testimony was that he reminded Shelton and Forbes that "we've already been through this many times". Tr. 6458-59, 7181-83, 7342. Shelton denied the conversations ever happened. If believed, Corigliano's testimony shows Shelton's actual knowledge. But, Corigliano testified to no acts of avoidance by Shelton.

The remaining item of evidence was described as being,

> when [Shelton was] meeting with a co-conspirator who began to discuss additional manipulation of certain accounts, [Shelton] told

> her to "hold that thought," left the room, and, upon returning, changed the subject by asking if there was anything else they needed to discuss.

App. *infra*, at 4a. Only a nonsensical interpretation of this evidence could support a conscious avoidance instruction. Specifically, the expression "hold that thought," which normally means to hold a thought for later discussion, would have to be read to have the opposite meaning of, "don't hold that thought for later discussion, and instead drop it." Similarly, an invitation to raise "anything else" would have to be read to have the opposite meaning of "don't raise anything else." Not surprisingly, the prosecutors never argued this nonsensical interpretation of the evidence to either the jury in summation or to the district court in support of the prosecution's request for a conscious avoidance instruction.[21]

Each of these three pieces of evidence upon which the court of appeals relied presented solely a question of credibility. If believed, the evidence showed knowledge; if disbelieved, it showed nothing. That evidence should not have been used as an invitation for the jury to compromise on "a middle ground of conscious avoidance." *United States v. Garzon*, 688 F.2d 607, 609 (9th Cir. 1982).

Not only was there no evidence of conscious avoidance in the record, the government never argued to the jury that Shelton had avoided acquiring knowledge. Instead,

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[21] Furthermore, the Second Circuit's description of this evidence erroneously implies that Shelton interrupted this conversation before the co-conspirator had finished what she only "began" to tell Shelton. App. *infra*, at 4a. To the contrary, that prosecution witness testified that she had already told Shelton all she had to say even before Shelton left the meeting asking her to "hold that thought." Tr. 2906, 2907, 2911.

the government made an argument that played directly into the danger of giving a conscious avoidance instruction in a case in which there is no evidence of avoidance. Thus, the government repeatedly argued to the jury that Shelton, as president of the company, had *access* to the information that *would have* given him knowledge of the fraud.[22] This encouraged the jury to convict Shelton on an improper theory that he "should have inquired further." That theory might warrant civil liability through some negligence or recklessness theory, but not criminal liability, which requires either knowledge or the conscious avoidance of that actual knowledge.

The jury deliberated for thirty-two days over a period of nine weeks. The burden-lowering conscious avoidance instruction was mentioned nine times by the trial judge to the jury. If delivery of the instruction was erroneous, it could not possibly be deemed harmless.

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[22] When cross-examining Shelton, the prosecutor repeatedly had Shelton admit that he had "access to these full financial packages" of the company, had "access to any division's budget", had "access to the company's records," and even had "the ability, if [he] wished, to see company employees' emails." Tr. 12913, 12759, 12561, 12564-66. In summation, the prosecutor returned to this theme, reminding the jury of Shelton's "position" in the company, the "access" and "control" he had, including "[c]omplete access to the e-mails of the company, [and to] the files of the company." Tr. 14870-71.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APRIL 23, 2007

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan Courthouse, 500 Pearl Street, in the City of New York, on the 22ND day of November, two thousand six.

Present:

HON. RICHARD I. CARDAMONE,
HON. ROGER J. MINER,
HON. ROBERT A. KATZMANN,
Circuit Judges.

UNITED STATES OF AMERICA,

Appellee,

v.

E. KIRK SHELTON,

Defendant-Appellant.

No. 054342-

cr

For Appellee:	NORMAN GROSS, GLENN J. MORAMARCO, Assistant United States Attorneys (*for* CHRISTOPHER J. CHRISTIE, United States Attorney for the District of New Jersey, GEORGE S. LEONE, Chief, Appeals Division), Newark, N.J.
For Defendant-Appellant:	JOHN W. NIELDS, JR., WILLIAM L. WEBBER, ROBERT H. COX, Howrey LLP, Washington, D.C.

Appeal from the United States District Court for the District of Connecticut (Thompson, *J.*)

On consideration whereof, it is hereby **ORDERED, ADJUDGED**, and **DECREED** that the judgment of the district court, dated August 4, 2005, be and it hereby is **AFFIRMED**.

E. Kirk Shelton appeals his conviction after a jury trial of one count of conspiracy to commit mail, wire, and securities fraud, and to make false statements to the SEC, in violation of 18 U.S.C. § 371; two counts of mail fraud, in violation of 18 U.S.C. § 1341; one count of wire fraud, in violation of 18 U.S.C. § 1343; two counts of making false statements to the SEC, in violation of 15 U.S.C. § 78ff(a); and six counts of securities fraud, in violation of 15 U.S.C. §§ 78j(b) and 78ff(a). On appeal, Shelton argues (1) that

there was an inadequate factual predicate for the district court's conscious avoidance charge, and that the error was not harmless as it allowed the jury to convict him on a theory of negligence; (2) that the indictment was constructively amended by the conscious avoidance charge, which broadened the possible bases for conviction in the indictment; and (3) that the district court should not have accepted the government's request for a leadership enhancement once the conscious avoidance charge had been given. As to (1) and (2), Shelton requests a new trial; in the alternative, he requests that, pursuant to (3), we remand for resentencing. We presume the parties' familiarity with the underlying facts and the procedural history, which we reference only as necessary to explain our decision.

We turn first to his challenge to the jury instruction. "A conscious avoidance instruction may only be given if (1) the defendant asserts the lack of some specific aspect of knowledge required for conviction, and (2) the appropriate factual predicate for the charge exists." *United States v. Svoboda*, 347 F.3d 471, 480 (2d Cir. 2003) (internal quotation marks and ellipses omitted). There are two ways the government may establish a factual predicate for the charge: either "there must be evidence that the defendant . . . was aware of a high probability of the disputed fact and . . . deliberately avoided confirming that fact," or there must be evidence that the defendant's involvement in the offense is "*so overwhelmingly suspicious* that the defendant's failure to question the suspicious circumstances establishes the defendant's purposeful contrivance to avoid guilty knowledge." *Id.* (internal quotation marks and citations omitted; emphasis in original). Where this test is met, "[e]ven when the government attempts to prove actual knowledge, an instruction on conscious avoidance can still be appropriate." *United States v. Jacobs*, 117 F.3d 82, 98 (2d Cir. 1997).

"We review a claim of error in jury instructions *de novo*, reversing only where, viewing the charge as a whole, there was a prejudicial error." *United States v Aim-Marshall*, 336 F.3d 167, 170 (2d Cir. 2003). However, where the propriety of giving a conscious avoidance instruction is essentially "a challenge to the sufficiency of the evidence to support a conscious avoidance conviction[,] [a] defendant . . . bears a heavy burden. In considering such a challenge, we review all the evidence presented at trial in the light most favorable to the government, crediting every inference that the jury might have drawn in favor of the government. A conviction will be affirmed so long as *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* at 171 (internal quotation marks and citations omitted; emphasis in original).

We conclude that there was a sufficient factual predicate for the conscious avoidance charge. Among the other evidence in the record, we note particularly the testimony that (1) when reviewing with a co-conspirator a document that stated that "reserves are being managed to meet quarterly targets," Shelton tore it up and said, "I guess I never saw that document"; (2) when meeting with a co-conspirator who began to discuss additional manipulation of certain accounts, he told her to "hold that thought," left the room, and, upon returning, changed the subject by asking if there was anything else they needed to discuss; and (3) when traveling with co-defendant Walter Forbes and a co-conspirator, Walter Forbes asked if there were "any other smoking guns that we have to worry about," to which the co-conspirator responded with a partial list of the accounting frauds at issue, and Shelton did not further inquire. We think that from this evidence and more, the jury could fairly conclude that at the very least, if Shelton did not have actual knowledge, he was aware of a high likelihood that accounting fraud was occurring and deliberately avoided

confirming that fact. *Cf. United States v. Hopkins*, 53 F.3d 533, 542 (2d Cir. 1995) (upholding conscious avoidance charge as to a supervisor's knowledge of his employees' engagement in illegal practices based, in part, on his statement to an employee presenting him with a tampered sample that "I know nothing, I hear nothing"); *United States v. Walker*, 191 F.3d 326, 337 (2d Cir. 1999) (identifying as "a paradigmatic case of when a conscious avoidance charge is appropriate" one in which a supervisor denied knowledge of his employees' fraudulent conduct but where he reviewed their work and was once confronted with evidence of falsity). While Shelton quibbles with this interpretation of the evidence and argues that, even assuming the validity of the testimony of his co-conspirators who testified against him, none of it was suspicious when viewed properly, he had the opportunity to make this argument to the jury, which rejected it. When we review the evidence in the light most favorable to the government, and view the evidence as a whole, it is clear that the conscious avoidance charge had an appropriate factual predicate.

We next turn to Shelton's argument that the conscious avoidance charge constructively amended the indictment. "To prevail on a constructive amendment claim, a defendant must demonstrate that either the proof at trial or the trial court's jury instructions so altered an essential element of the charge that, upon review, it is uncertain whether the defendant was convicted of conduct that was the subject of the grand jury's indictment." *United States v. Salmonese*, 352 F.3d 608, 620 (2d Cir. 2003) (internal quotation marks and citations omitted). Shelton's argument is based on the premise that an essential element of the indictment was his role in directing the fraud, while the conscious avoidance charge permitted him to be convicted for merely turning away from actual knowledge of the fraud. Without reaching the government's response — that a conscious avoidance

charge can never constructively amend an indictment – we conclude that there was no constructive amendment here because Shelton's underlying premise is incorrect. His role as a director of the fraud was in no way an essential element of the indictment. To support his factual premise, Shelton points only to the statement in the indictment that he engaged in the conspiracy "with the assistance of co-conspirators who were [his] corporate subordinates," ¶ 19, and two sentences where the indictment alleges that Shelton "directed other conspirators" to increase certain earnings figures, ¶¶ 24, 27. Against the rest of the indictment, which simply alleges that Shelton acted as one of the conspirators to further the fraud, the contention that his role as a director was central to the indictment is without merit. As Shelton "was given notice of [the] 'core of the criminality' to be proven at trial," *United States v. Clemente*, 22 F.3d 477, 482 (2d Cir. 1994) (internal quotation marks and citations omitted), his constructive amendment argument must fail.

Finally, Shelton makes no argument that the district court's factual findings on the subject of his leadership role were clearly erroneous. He simply challenges the government's right to seek a sentencing enhancement for that role. His argument is that, having obtained a jury instruction permitting the jury to convict even if he did not direct the fraud, the government should be held to have forfeited its right to seek a sentencing enhancement for his having directed the fraud. This argument "misses the distinction between elements of an offense and facts relevant to sentencing. Elements of an offense must be tried to a jury, but facts relevant to sentencing may be found by a judge, within the constraints of the Sixth Amendment." *United States v. Vaughn*, 430 F.3d 518, 526 (2d Cir. 2005). Indeed, even after the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220 (2005), "district courts may find facts relevant to sentencing by a preponderance of the evidence,

even where the jury acquitted the defendant of that conduct," within certain constraints not relevant here. *Vaughn*, 430 F.3d at 527 (emphasis added). We see nothing unreasonable in the district court's application of a sentencing enhancement for leadership after permitting the jury to convict on a theory of conscious avoidance.

We have considered all of Shelton's arguments and find them without merit. Accordingly, for the reasons set forth above, the judgment of the district court is hereby

AFFIRMED.

FOR THE COURT:

Thomas W. Asreen, Acting Clerk

By: /s/ Richard Alcantara

Richard Alcantara, Deputy Clerk

APPENDIX B

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA	)	Criminal No. 3:02CR0026 (AWT)
v.	)	
E. KIRK SHELTON	)	

RULING ON MOTION OF DEFENDANT E. KIRK SHELTON FOR A JUDGMENT OF ACQUITTAL PURSUANT TO FED. R. CRIM. P. 29 OR FOR A NEW TRIAL PURSUANT TO FED. R. CRIM. P. 33

For the reasons set forth below, the Motion of Defendant E. Kirk Shelton for a Judgment of Acquittal Pursuant to Fed. R. Crim. P. 29 or For a New Trial Pursuant to Fed. R. Crim. P. 33 (Doc. No. 1480) was denied on July 20, 2005. (See Tr. 7/20/05 at 4.)

Defendant Shelton makes ten points in support of his motion. As a preliminary to those ten points, defendant Shelton purports to give a statement of facts. However, insofar as that statement of facts addresses matters that are material to the adjudication of the instant motion, defendant Shelton either ignores evidence relied upon by the government at trial or insists that his own interpretation of the evidence is the only reasonable one. He makes in

substance the same arguments he made at length to the jury during closing arguments; those arguments were, in the court's view, properly rejected by the jury, which appeared to be not only perceptive and not easily fooled, but also extremely conscientious and orderly in its processes. Far from being "convinced that the jury. has reached a seriously erroneous result or that the verdict is a miscarriage of justice," United States v. Autuori, 212 F.3d 105, 120 (2d Cir. 2000), the court believes the jury's verdict is a true and just one, and that verdict is consistent with the court's own conclusion that defendant Shelton committed perjury, rising to the level of obstruction of justice, when he testified at trial.[23]

While there are certain minor respects where the court would cite to additional or different page numbers in the trial

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23 The court notes that defendant Shelton argues that "Corigliano admitted on direct examination that Shelton had already mentioned at the March 6 meeting that the $165 million included $80 to 90 million of deferred revenue and gain from the Interval transaction," relying on the transcript at page 7527 line 23. (Deft.'s Mem. (Doc. No. 1506) at 38.) As the court has informed the parties, the court's notes as to that portion of Corigliano's testimony show that Corigliano testified that the first time the $80 to 90 million figure was mentioned was in the first few days of April, after Corigliano and defendant Shelton learned that they had been fired. Also, it should be noted that the same ground was covered with Corigliano by the government on redirect, and when Corigliano was asked whether defendant Shelton said anything at the March 6th meeting to the effect that the $165 million included $85 to 90 million from Interval, Mr. Corigliano responded, "No, he didn't." (Tr. At 9565, lines 8-10.)

record,[24] or would refer to an inference that could be drawn from a witness' testimony or based on that testimony and other evidence, as opposed to a statement having been made by a witness,[25] the court finds the government's description of the evidence in this case to be accurate in all respects material to the adjudication of the instant motion.

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24 For example, with respect to the government's Opposition, at page 17, 2nd under subsection 2, the citation to transcript page 6502 should be to page 6505; at page 21, 1st paragraph under subsection 5, 6888 should be 6887-88; at page 25, 2nd paragraph, 7381 should be 7381-82; at page 27, 2nd full paragraph, the 2nd "Id." should be 2607-08; at page 28, 2nd paragraph, last line, "Id." should be 2611-12; at page 29, top carry-over paragraph, "Id." should be 2614; at page 31, 1st full paragraph, 2603 should be 2602; at page 35, 1st paragraph under subsection 6, 2739 should be 2738; at page 37, top carry-over paragraph, 2755 should be 2754-55; at page 44, 1st full paragraph, "Id." should be 2906; at page 54, 1st paragraph under subsection 5, 9743 should be 9744; at page 55, 1st full paragraph, 9829 should be 9829-33; and at page 56, top carry-over paragraph, 2895-96 should be 2895-97.

25 For example, with respect to the government's Opposition, at page 20, the 1st full paragraph cites Tr. 11055-58 for the proposition that McLeod testified that Shelton received "cheat sheets", while McLeod actually testified that GX 58 was the type of document given to defendant Shelton; and at page 45, the end of the last sentence in subsection 11 says that Shelton never asked any questions about either practice in this conversation, while Pember testified that Shelton may have asked questions but she didn't remember.

Point I. Defendant Shelton argues that the court should grant him a new trial in the interests of justice because Cosmo Corigliano and Anne Pember gave false testimony and there was an absence of any credible evidence that Shelton knowingly and willfully participated in a conspiracy to misstate CUC's financial results or to commit any of the substantive offenses with which he was charged.

In opposition to defendant Shelton's motion the government filed a Memorandum of the United States in Opposition to Shelton's Motion for a Judgment of Acquittal Pursuant to Rule 29 and for a New Trial Pursuant to Rule 33. (Doc. No. 1543) (the "Opposition") and a Surreply Memorandum of the United States in Opposition to Shelton's Motion for a Judgment of Acquittal Pursuant to Rule 29 and for a New Trial Pursuant to Rule 33 (Doc. No. 1584) (the "Surreply"). The court finds defendant Shelton's argument on this point unpersuasive for substantially the reasons set forth by the government in its Opposition and its Surreply.

Point II. Defendant Shelton argues that the court should vacate his conviction because the government knew or should have known that its two principal cooperating witnesses, i.e. Pember and Corigliano, gave false and misleading testimony on numerous material matters. The court finds Shelton's arguments on this point unpersuasive for the reasons set forth by the government in its Opposition and its Surreply.

Point III. Defendant Shelton argues that the conscious avoidance charge was improper. The court finds defendant Shelton's arguments on this point unpersuasive for the reasons set forth by the government in its Opposition and its Surreply.

Point IV. Defendant Shelton argues that evidence relating to codefendant Walter Forbes' plane expense charge

was improperly admitted. The court finds defendant Shelton's arguments on this point unpersuasive for substantially the reasons set forth by the government in its Opposition.

Point V. Defendant Shelton argues that the testimony of John Oller was improperly admitted. The court notes that it rejected defendant Shelton's arguments on this point in its written ruling during the trial (see Ruling on Government Trial Motion No. 3 (Doc. No. 1137)) and concludes that defendant Shelton's arguments are unpersuasive for substantially the reasons set forth by the government in its Opposition and its Surreply.

Point VI. Defendant Shelton argues that the introduction of evidence concerning misconduct prior to 1995 constituted a constructive amendment of, and a prejudicial variance to, the indictment. The court finds defendant Shelton's arguments on this point unpersuasive for the reasons set forth by the government in its Opposition and its Surreply.

Point VII. Defendant Shelton argues that Corigliano and Pember were improperly allowed to offer expert testimony on technical accounting issues. The court finds defendant Shelton's arguments on this point unpersuasive for substantially the reasons set forth by the government in its Opposition and its Surreply.

Point VIII. Defendant Shelton argues that this case presented extraordinary circumstances requiring the government to confer immunity on Stuart Bell and that it was error for the court to decline to require the government to immunize him. As an initial matter, the court notes that the motion was denied because it was untimely. See United States v. Turkish, 623 F.2d 769, 777-78 (2d Cir. 1980). Additionally, the court finds defendant Shelton's arguments

unpersuasive for the reasons set forth by the government in its Opposition and its Surreply.

Point IX. Defendant Shelton argues that the court improperly declined to give the jury a missing witness instruction. The court finds this argument unpersuasive for the reasons set forth by the government in its Opposition and its Surreply.

Point X. Defendant Shelton argues that the government failed to present sufficient evidence from which a reasonable juror could conclude beyond a reasonable doubt that he is guilty of any of the counts charged in the Superseding Indictment.

> A defendant who challenges the sufficiency of the case against him bears a heavy burden. *United States v. LaBarbara*, 129 F.3d 81, 84 (2d Cir. 1997); *United States v. Gaviria*, 740 F.2d 174, 183 (2d Cir. 1984). The Court must construe the evidence, whether direct or circumstantial, in the light most favorable to the government, drawing all reasonable inferences in the government's favor. *United States v. Olbres*, 61 F.3d 967, 970 (2d Cir.), cert. denied, 516 U.S. 991 (1995). *United States v. Matthews*, 20 F.3d 538, 548 (2d Cir. 1994). Similarly, all determinations of credibility are resolved in favor of the jury's verdict. *United States v. Wallace*, 59 F.3d 333, 338 (2d Cir. 1995). The government's evidence need not negate all theories consistent with innocence and the evidence must be considered in conjunction, not in isolation. *United States v. Rosenthal*, 9 F.3d 1016, 1024 (2d Cir. 1993).

> If the evidence, thus interpreted, suffices to convince any reasonable juror of a defendant's guilt beyond a reasonable doubt, the Court must deny the motion for judgment of acquittal. *United States v. Martinez*, 54 F.3d 1040, 1042 (2d Cir. 1995); *United States v. Jones*, 16 F.3d 487, 490 (2d Cir. 1994), appeal after remand, 122 F.3d 1058 (2d Cir. 1997), cert. denied, 522 U.S. 976. *See also Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (Defendant must demonstrate that no rational trier of fact would have found the elements of the crime beyond a reasonable doubt).

United States v. Autuori, No. 3:96-CR-161(EBB), 1998 WL 774232, at *15-16 (D. Conn. Aug. 28, 1998). Viewing the evidence in this case in the light most favorable to the government, as summarized by the government in its Opposition and its Surreply, Shelton can make no plausible argument that he is entitled to a judgment of acquittal.

* * * *

Accordingly, the Motion of Defendant E. Kirk Shelton for a Judgment of Acquittal Pursuant to Fed. R. Crim. P. 29 or For a New Trial Pursuant to Fed. R. Crim. P. 33 (Doc. No. 1480) was DENIED.

It is so ordered.

Dated this 4th day of August 2005, at Hartford, Connecticut.

Alvin W. Thompson

United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
THURGOOD MARSHALL U.S. COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

Thomas Asreen
ACTING CLERK

Date:	
Docket Number:	05-4342-cr
Short Title:	USA v. Forbes (Shelton)
DC Docket Number:	02-cr-264
DC:	CONNECTICUT (NEW HAVEN)
DC Judge:	Honorable Alvin Thompson

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 23rd day of January two thousand seven.

United States of America,

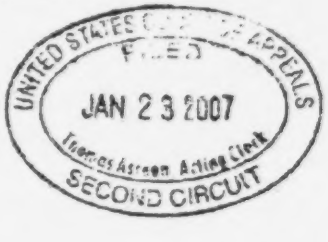
Appellee,

v.

E. Kirk Shelton,

Defendant-Appellant.

Docket No.: 05-4342-cr



A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellant E. Kirk Shelton. Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED**.

It is further noted that the petition for rehearing en bane has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

For the court,
Thomas Asreen, Acting Clerk

By:_____
Motion Staff Attorney

APPENDIX D

U.S. CONST. amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. amend. VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

18 U.S.C. § 371

Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

18 U.S.C. § 1341

Frauds and swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or

takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation affects a financial institution, such person shall be fined not more than $ 1,000,000 or imprisoned not more than 30 years, or both.

18 U.S.C. § 1343

Fraud by wire, radio, or television

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation affects a financial institution, such person shall be fined not more than $ 1,000,000 or imprisoned not more than 30 years, or both.

15 U.S.C. § 78ff(a)

Penalties

(a) Willful violations; false and misleading statements. Any person who willfully violates any provision of this title (other

than section 30A), or any rule or regulation thereunder the violation of which is made unlawful or the observance of which is required under the terms of this title, or any person who willfully and knowingly makes, or causes to be made, any statement in any application, report, or document required to be filed under this title or any rule or regulation thereunder or any undertaking contained in a registration statement as provided in subsection (d) of section 15 of this title, or by any self-regulatory organization in connection with an application for membership or participation therein or to become associated with a member thereof, which statement was false or misleading with respect to any material fact, shall upon conviction be fined not more than $ 5,000,000, or imprisoned not more than 20 years, or both, except that when such person is a person other than a natural person, a fine not exceeding $ 25,000,000 may be imposed; but no person shall be subject to imprisonment under this section for the violation of any rule or regulation if he proves that he had no knowledge of such rule or regulation.

15 U.S.C. § 78j(b)

Manipulative and deceptive devices

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange--

(a)

(1) To effect a short sale, or to use or employ any stop-loss order in connection with the purchase or sale, of any security registered on a national securities exchange, in contravention of such rules and regulations as the

Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(2) Paragraph (1) of this subsection shall not apply to security futures products.

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, or any securities-based swap agreement (as defined in section 206B of the Gramm-Leach-Bliley Act), any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

Rules promulgated under subsection (b) that prohibit fraud, manipulation, or insider trading (but not rules imposing or specifying reporting or recordkeeping requirements, procedures, or standards as prophylactic measures against fraud, manipulation, or insider trading), and judicial precedents decided under subsection (b) and rules promulgated thereunder that prohibit fraud, manipulation, or insider trading, shall apply to security-based swap agreements (as defined in section 206B of the Gramm-Leach-Bliley Act) to the same extent as they apply to securities. Judicial precedents decided under section 17(a) of the Securities Act of 1933 and sections 9, 15, 16, 20, and 21A of this title, and judicial precedents decided under applicable rules promulgated under such sections, shall apply to security-based swap agreements (as defined in section 206B of the Gramm-Leach-Bliley Act) to the same extent as they apply to securities.

APPENDIX E

Cases with conscious avoidance jury instructions, 1997-2006

1st Circuit

United States v. Gonsalves, 435 F.3d 64 (1st Cir. 2006); *United States v. Thomas*, 467 F.3d 49 (1st Cir. 2006); *United States v. Lizardo*, 445 F.3d 73 (1st Cir. 2006); *United States v. Carucci*, 364 F.3d 339 (1st Cir. 2004); *United States v. Keene*, 341 F.3d 78 (1st Cir. 2003); *United States v. Bilis*, 170 F.3d 88 (1st Cir. 1999); *United States v. Cunan*, 152 F.3d 29 (1st Cir. 1998); *United States v. Guerrero*, 114 F.3d 332 (1st Cir. 1997); *United States v. Epstein*, 426 F.3d 431 (1st Cir. 2005); *United States v. Coviello*, 225 F.3d 54 (1st Cir. 2000); *United States v. Singh*, 222 F.3d 6 (1st Cir. 2000); *United States v. Reiner*, 397 F. Supp. 2d 101 (D. Me. 2005); *United States v. Alfonzo-Reyes*, 384 F. Supp. 2d 523 (D.P.R. 2005); *United States v. Carucci*, 222 F. Supp. 2d 117 (D. Mass. 2002)

2d Circuit

United States v. Nektalov, 461 F.3d 309 (2d Cir. 2006); *United States v. Fernandez*, 184 Fed. Appx. 83 (2d Cir. 2006); *United States v. Londono*, 175 Fed. Appx. 370 (2d Cir. 2006); *United States v. Arboleda*, 151 Fed. Appx. 86 (2d Cir. 2005); *United States v. Ibarra*, 121 Fed. Appx. 879 (2d Cir. 2005); *United States v. Iqbal*, 117 Fed. Appx. 155 (2d Cir. 2004); *United States v. Morgan*, 385 F.3d 196 (2d Cir. 2004); *United States v. Bruce*, 75 Fed. Appx. 849 (2d Cir. 2003); *United States v. Abreu*, 342 F.3d 183 (2d Cir. 2003); *United States v. Aina-Marshall*, 336 F.3d 167 (2d Cir. 2003); *United States v. Florez-Belluccio*, 62 Fed. Appx. 391 (2d Cir. 2003); *United States v. Andino*, 39 Fed. Appx. 628 (2d Cir. 2002); *United States v. Bautista*, 252 F.3d 141 (2d Cir.

2001); *United States v. Robinson*, 1999 WL 1059932 (2d Cir. Nov. 10, 1999); *United States v. Monaco*, 199 F.3d 1324 (2d Cir. 1999) (table); *United States v. Gonzalez*, 1999 WL 89488 (2d Cir. Feb. 16, 1999); *United States v. Perez*, 1998 WL 852912 (2d Cir. Dec. 1, 1998); *United States v. Esquivel-Vega*, 1999 WL 613478 (9th Cir. Aug. 12, 1999); *United States v. Davidson*, 1998 WL 777766 (2d Cir. Oct. 29, 1998); *United States v. Rodriguez*, 1998 WL 634209 (2d Cir. Mar. 27, 1998); *United States v. Ebbers*, 458 F.3d 110 (2d Cir. 2006); *United States v. Lancaster*, 185 Fed. Appx. 48 (2d Cir. 2006); *United States v. Chu*, 183 Fed. Appx. 94 (2d Cir. 2006); *United States v. Barber*, 132 Fed. Appx. 891 (2d Cir. 2005); *United States v. Zedner*, 401 F.3d 36 (2d Cir. 2005); *United States v. Guevara*, 96 Fed. Appx. 745 (2d Cir. 2004); *United States v. Solano*, 94 Fed. Appx. 17 (2d Cir. 2004); *United States v. Sempere-Valero*, 84 Fed. Appx. 146 (2d Cir. 2004); *United States v. Svoboda*, 347 F.3d 471 (2d Cir. 2003); *United States v. Schultz*, 333 F.3d 393 (2d Cir. 2003); *United States v. Meskini*, 319 F.3d 88 (2d Cir. 2003); *United States v. Al Morshed*, 69 Fed. Appx. 13 (2d Cir. 2003); *United States v. Rhodis*, 58 Fed. Appx. 855 (2d Cir. 2003); *United States v. Rhodis*, 58 Fed. Appx. 527 (2d Cir. 2003); *United States v. Reyes*, 302 F.3d 48 (2d Cir. 2002); *United States v. Davis*, 41 Fed. Appx. 493 (2d Cir. 2002); *United States v. Bakal*, 20 Fed. Appx. 37 (2d Cir. 2001); *United States v. Tropeano*, 252 F.3d 653 (2d Cir. 2001); *United States v. Sogomonian*, 247 F.3d 348 (2d Cir. 2001); *United States v. Nachamie*, 28 Fed. Appx. 13 (2d Cir. 2001); *United States v. Shapiro*, 2 Fed. Appx. 133 (2d Cir. 2001); *United States v. Samaria*, 239 F.3d 228 (2d Cir. 2001); *United States v. Caruso*, 2000 WL 1134359 (2d Cir. Aug. 9, 2000); *United States v. Lincecum*, 2000 WL 1015927 (2d Cir. July 20, 2000); *United States v. Ferrarini*, 219 F.3d 145 (2d Cir. 2000); *United States v. Laureano*, 2000 WL 241210 (2d Cir. Feb. 1, 2000); *United States v. Cox*, 1999 WL 972646 (2d Cir. Oct. 01, 1999); *United States v. Walker*, 191

United States v. LeBreux, 1998 WL 887223 (2d Cir. Dec. 15, 1998); *United States v. Allamby*, 1998 WL 781172 (2d Cir. Nov. 9, 1998); *United States v. Gabriel*, 125 F.3d 89 (2d Cir. 1997); *United States v. Jacobs*, 117 F.3d 82 (2d Cir. 1997); *United States v. Lopac*, 411 F. Supp. 2d 350 (S.D.N.Y 2006); *Pitcher v. United States*, 371 F. Supp. 2d 246 (E.D.N.Y. 2005); *United States v. Zapata*, 369 F. Supp. 2d 454 (S.D.N.Y. 2005); *United States v. Agostini*, 365 F. Supp. 2d 530 (S.D.N.Y. 2005); *United States v. Nektalov*, 2004 WL 2389826 (S.D.N.Y. Oct. 25, 2004); *United States v. Aliotta*, 1998 WL 43015 (S.D.N.Y. Feb. 03, 1998); *United States v. Quattrone*, 441 F.3d 153 (2d Cir. 2006); *United States v. Adelson*, 2006 WL 870955 (S.D.N.Y., Apr. 3, 2006); *Bennett v. United States*, 2006 WL 738162 (S.D.N.Y. Mar. 22, 2006); *United States v. Kaplan*, 2005 WL 3148060 (S.D.N.Y. Nov. 22, 2005); *United States v. Barber*, 2004 WL 1505529 (N.D.N.Y. July 6, 2004); *Kalani v. United States*, 2002 WL 31453094 (S.D.N.Y. Oct. 31, 2002); *United States v. Haouari*, 2001 WL 1154714 (S.D.N.Y. Sept. 28, 2001); *United States v. Tunick*, 2001 WL 282698 (S.D.N.Y. 2001); *United States v. Meneilly*, 78 F. Supp. 2d 95 (E.D.N.Y. Dec. 21, 1999); *Legge v. United States*, ; 1997 WL 129397 (S.D.N.Y. Mar. 21, 1997)

3d Circuit

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